TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 81

NATIONAL EQUIPMENT RENTAL, LTD.,
PETITIONER,

vs.

STEVE SZUKHENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1963
CERTIORARI GRANTED APRIL 22, 1963

INDEX

APPENDIX

Docket Entries

(a)

1-23-62 Complaint filed.

1-24-62 Summons received, etc.

2-19-62 Notice of special appearance.

3-2-62 Notice of motion to quash summons, etc.

3-7-62 Affidavit of Wilbur G. Silverman.

3-7-62 Memorandum of law.

3-7-62 Affidavit Harry R. Schwartz.

3-8-62 Supplementary affidavit—Silverman.

3-8-62 Supplementary memorandum.

3-9-62 Affidavit of Harry R. Schwartz.

3-9-62 Memorandum of Law—Harry R. Schwartz.

3-19-62 Opinion (Dooling).

3-23-62 Notice of appeal and bond filed.

4-3-62 Record on appeal certified and handed to Mr. Silverman for delivery to Court of Appeals.

4-5-62 Receipt of above record received from Court of Appeals and filed.

Opinion and Order of Dooling, J. Appealed From

(50)

Defendants, residents of Michigan, move to quash the service of summons on them.

Defendants obtained farm equipment from Plaintiff under an instrument, denominated a lease, which Defendants signed and acknowledged in May of 1961 and which Plaintiff signed in July 1961. The last operative clause of the instrument provides:

> "* * *; and the Lessee [Defendants] hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

Plaintiff commenced this action on January 23, 1962, alleging a total default under the lease commencing June 20, 1961 and demanded all the payments due under the lease. The complaint alleged in a clear and separate paragraph that Defendants had designated Florence Weinberg as an agent for the purpose of accepting service of process within the State of New York. The marshal delivered two copies of the summons and complaint to Florence Weinberg on January 24, 1962 and on that same day she mailed the summons and complaint to Defendants stating that they had been served upon her as the Defendants' agent for the purpose of accepting process within (51) the State of New York in accordance with Defendants' contract with Plaintiff. On January 24, 1962, Plaintiff itself notified Defendants by certified mail of the service of process on Florence Weinberg, the agent designated by them.

On February 15, 1962, (twenty-two days after the service of process on Florence Weinberg) counsel for defendants mailed to Plaintiff's attorney, a notice that counsel appearing specially for Defendants "solely for the purpose of moving to set aside the service of the summons and

complaint". On February 27, 1962, counsel for Defendants served by mail the present motion to quash service, challenging the validity of such a designation of an "agent" to receive service of process as not adequately calculated to give notice and intimating that Florence Weinberg, a person unknown to Defendants and unrelated to them, was, inferentially, a "representative of the Plaintiff in some capacity." The Defendants' argument notes that Florence Weinberg was appointed (meaning, rather, nominated) by Plaintiff and was, seemingly, Plaintiff's agent whereas an appointed agent to receive process is meant to be an agent representative of and representing the Defendants; it is urged that the "agency" here is too unreal to support service of process and is apparently (52) a dual and, therefore, illicit and, for present purposes, an ineffective agency.

As Plaintiff points out, the clause appointing Florence Weinberg was no buried fineprint clause. And, as Plaintiff points out, abundant, actual notice of the service of process was promptly and punctiliously given in a manner that made the whole position plain to Defendants at a glance. Plaintiff's attorney explains that, as Plaintiff's General Counsel and Assistant Secretary, he supervises the proper effectuation of such service of process, seeing to it in each case that Florence Weinberg forthwith forwards to the Defendant the process served on her, together with the explanatory covering letter, and seeing to it that Plaintiff itself sends a separate notification letter to each Defendant forthwith. Plaintiff's attorney explains that Florence Weinberg has agreed to act as designated agent of the lessees without any compensation on the part of the Plaintiff.

Certainly under Plaintiff's practice the clarity of agreement and abundance of comprehensible notice cannot be gainsaid. The principle relied on, that a Defendant may agree in advance to submit himself personally to the jur-

isdiction of a court that, in the absence of agreement, could (53) not extend its process upon him, is settled (*Gilbert* v. *Burnstine*, 1931, 174 N. E. 706, 255 N. Y. 348) and, if not literally invoked by Rule 4 (d) 1, is recognized and applied in the federal courts. (*U. S.* v. *Balanovsky*, 2d Cir. 1956, 236 F. 2d 298, 303; *Kenny Construction Co.* v. *Allen*, D. C. Cir. 1957, 248 F. 2d 656; *Owens* v. *Harkins*, M.D., Ala. N. D. 1955, 18 F. R. D. 62.)

The only possible question is whether such an agency arrangement as this for subjection to a personal jurisdiction that could not otherwise be effectively exerted requires intrinsic provision for reasonable notification, such, for example, as that exacted, in a different context by *Wuchter* v. *Pizzutti*, 1928, 276 U. S. 13. If so, actuality of notice is beside the point for it is not assured in advance.

Here, Florence Weinberg, was not, for all that appears, a party to the transaction by which she was appointed; her acceptance of her appointment is nowhere evidenced save by her performance, many months after the lease was executed, of a duty that would have flowed from her acceptance of her appointment when it was made. It is, simply, exact to say that Florence Weinberg was not appointed the Defendants' (54) agent by their signing the lease and giving it to Plaintiff. To appoint her their agent, Defendants had to deal with her, not Plaintiff, and they did not deal with her. Hence, nothing in the lease, essaying ineffectively to create an agency by appointment, provided for notice to Defendants through the putative agent.

In theory, that was as plain to Defendants as to Plaintiff and it is easy to say that, therefore, Defendants were the ones to make their appointment of Florence Weinberg secure and real and assure themselves of notice. Yet that would have been alien to the arrangement; it rested rather on Florence Weinberg's agreement with Plaintiff, aliunde the lease and unknown to the lessees, that she would act as agent on behalf of the lessees without compensation, and,

strictly, without any obligation not to lay down the agency whenever she chose.

Hence, the nominal appointment of Florence Weinberg as Defendants' agent did not assure an agent's notice to Defendants, if that was requisite. Subject to uncertain policy limitations, Plaintiff would have been free to demand a plain agreement that Defendants subject themselves to suit here without any notice except what Plaintiff undertook (55) to give them. Seemingly harsher, that would in fact have given a legal assurance of notice that the beguiling appearance of an agency that, doubtless through inadvertence, was legally unreal did not give, however, in practice it has given Defendants genuine notice. See, *e.g. National Equipment Rental, Ltd.* v. *Karlin*, Supreme Court, Nassau County, 1957, 166 N. Y. S. 2d 27, 6 Misc. 2d 128 (service on residents who had evaded process). But that was not the course chosen; the chosen course failed of its intended effect, which was not to require Defendants to submit to jurisdiction on notice from Plaintiff, but to supply Defendants with notice, through a fiduciary nominated by Plaintiff but appointed by Defendants. Whether, then, a provision fairly assuring notice is or is not required in principle in contracts to submit to jurisdiction, the present agency form of arrangement was based on assuring notice through an agency intended to be adequately real to produce that effect and the posited basis of the service arrangement fails with the failure of the agency arrangement to achieve intrinsic and continuing reality.

The service of process, accordingly, was insufficient and the result is a lack of jurisdiction over the persons of the Defendants. But see *Green Mountain College* v. (56) *Levine*, Vt. 1958, 139 A. 2d 822. The attempted service of the summons and complaint on each Defendant is, therefore quashed.

It is so ordered.

JOHN R. DOOLING, JR.
U.S.D.J.

Affidavit of Wilbur G. Silverman, Read in Opposition to Motion

(15) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

WILBUR G. SILVERMAN, being duly sworn, deposes and says he is the attorney for the above named plaintiff and makes this affidavit in opposition to the defendants' motion to quash the service of the summons and complaint on the defendants herein.

This action is based upon an equipment lease executed by the parties herein, and results from the default on the part of the defendants in making any payments after the equipment was specifically purchased by the plaintiff for the defendants' use.

The defendants signed the said lease and schedule and had their signatures acknowledged before a Notary Public in their own state of Michigan. The last paragraph before the signature lines of the said lease provided that the agreement shall be deemed to have been made in Nassau County, New York, the rights and liabilities of the parties determined in accordance with the laws of the State of New York and the lessee designated an agent for the purpose of accepting process within the State of New York.

(16) On January 24, 1962, the agent so designated in the agreement was served by the United States Marshal with the summons and complaint in this action. On the same date, by certified mail, return receipt requested, the plain-

tiff notified the defendants of said service and likewise copies so served were mailed to the defendants by the agent on whom service was made.

After the time to answer had expired, a purported special appearance was served by Harry R. Schwartz, Esq., and received on February 16, 1962 by deponent. Deponent telephoned said attorney and informed him that such special notice of appearance did not conform to the rules of this Court and that the same was not timely made. The instant motion likewise mailed February 27, 1962, long after the time to answer had expired, is not supported by any affidavit of either defendant. It is based upon the sole affidavit of the defendants' attorney, who obviously has no personal knowledge of the facts.

The motion is founded on the argument that the service of process on the agent of the defendants named in the contract should not be considered service upon the principals for the reasons:

(a) That the agent named is unknown to the defendants;

(b) That the designation of agent in the contract was "hidden amongst eighteen divisions of fine print";

(c) That the appointee should be related to the individual making the designation;

(d) That proper assurances should be provided to the end that the defendants receive sufficient notification of any process; and

(e) That individuals are not aware that the meaning of the word process includes the word summons.

(17) It is respectfully submitted that there is no requirement in law that an agent is required to be related or known to the principal. For example, the Secretary of State is unknown and unrelated to motorists outside the State of New York and to domestic and foreign corporations, which

by law, designates such Secretary of State as agent upon whom process may be served.

The contract was executed by the defendants and acknowledged before a Notary Public. The paragraph in which the agent was designated was the last paragraph before the signature lines. It was certainly no more hidden than any other paragraph in the contract and probably less so than paragraphs in between. Nevertheless, the fact that provisions of contracts are in printed forms make them no less effective by reason of their being a part of many paragraphs than if there were but few paragraphs. The fact is that the defendants having received the benefits of the contract are satisfied with the fruits thereof, but attempt to reject those paragraphs which they find distasteful. This they may not do.

The assurances to which the moving papers assert the defendants are entitled were in fact received, as evidenced by the letter sent by the plaintiff to the defendant, copy of which is attached to the moving papers.

Finally, the argument that individuals are unaware of the word process, is wholly without merit since the legal meaning of the word process, is wholly without merit since the legal import of an agreement is not challengeable. In fact, the moving papers themselves refer to the summons, as process. Moreover, there is no statement by either of the defendants in the moving papers to the effect that they were not aware of the word and counsel, in his affidavit, attempts to create an impression (18) by implication that individuals are not aware of the meaning of the word.

The defendants have acquired equipment valued at over $20,000, pursuant to the very agreement, portions of which their attorney now challenges. Is is a well settled principle of law that a person cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed or that he supposed it was different in its terms. It is likewise well settled that a mistake of law will not affect

enforceability of an agreement. The defendants cannot complain, therefore, that they did not know what was in the contract, that they didn't read the contract nor that they failed to understand the meaning of the word process. This is especially so, since the defendants have reaped the fruits of the very agreement which they challenge through counsel. Significantly, neither of the defendants have submitted an affidavit to support the contention upon which the attack has been made.

The equipment was delivered to the defendants, a receipt therefor was signed by the defendant, Steve Szukhent, on June 17, 1961, copy of which is annexed hereto, indicating that the equipment was received in good condition and as ordered. Implicitly, the defendants have been using the equipment without having paid for it and its use has been pursuant to the terms of the agreement. They, therefore, are estopped from challenging any provision in the agreement executed by them from which they have received benefits.

Service of process upon the defendants' agent is a well recognized method by which persons submit to jurisdiction of a Court having jurisdiction over the (19) subject matter of litigation. The very rules of this Court recognize that process may be made upon an agent. Rule 4 (d)(1) provides for service upon an individual "by delivering a copy of the summons and complaint to an agent authorized by appointment * * * to receive service of process." The language of the contract now challenged by the defendant is in *haec verba*, the language of the rule; and ignorance of the meaning of the word process should be of no avail to the defendants.

The motion herein having been made after the defendants' default in appearance and in answering, it is respectfully requested that the Court direct the Clerk to enter judgment in favor of the plaintiff on default.

Affidavit of Wilbur G. Silverman

WHEREFORE, deponent prays that an order be made and entered herein denying defendants' motion to quash and vacate the service of the summons and complaint herein, that the Court direct the Clerk to enter judgment in favor of the plaintiff on default as prayed for in the complaint and that plaintiff have such other and further relief as to the Court may seem just and proper in the premises.

(Sworn to by Wilbur G. Silverman on March 5, 1962).

Supplemental Affidavit of Wilbur G. Silverman, Read in Opposition to Motion

(37) UNITED STATES DISTRCT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

WILBUR G. SILVERMAN, being duly sworn, deposes and says that he makes this affidavit supplementing his affidavit in opposition to the defendants' motion to quash the service of the summons herein.

In addition to being General Counsel for the plaintiff corporation, deponent is Assistant Secretary of said corporation and is intimately cognizant of the manner in which plaintiff handles notification to defendants or service with process, by serving the agent named in plaintiff's lease with lessees. Deponent supervises the carrying out of the procedures as hereinafter outlined.

In every instance, notice is given by certified mail by plaintiff corporation addressed to the lessee, giving notice that the summons and complaint was served by serving the agent in accordance with the provisions of the contract. The agent upon whom service is so made forwards the process so served upon said agent to the defendant forthwith, together with a covering letter indicating that the enclosure was served on said agent in said capacity and on what date. Deponent oversees and makes certain that both the letter from the plaintiff as well (38) as the process with its covering letter are mailed as above indicated.

Supplemental Affidavit of Wilbur G. Silverman

In the instant case, the letter from the plaintiff by certified mail was sent as indicated in the moving papers and as counsel for defendant stated upon oral argument on the motion herein, process was in fact received from the agent pursuant to a covering letter which read as follows:

"Florence Weinberg
47-21 41st Street
Long Island City, N. Y.

Re: Lease No. OE-1775—A

January 24, 1962

Steve Szukhent & Robert Szukhent
7044 Elms Road
Flushing, Michigan

Gentlemen:

Please take notice that the enclosed Summons and Complaint was duly served upon me this day by the United States Marshal, as your agent for the purpose of accepting service of process within the State of New York, in accordance with your contract with National Equipment Rental, Ltd.

Very truly yours,

Florence Weinberg—FW :ff enc."

Deponent respectfully submits that the philosophical question as to what should be the disposition of the instant motion had the defendants received no notice, is academic and moot, since in the case at bar, the defendants received notice both from the plaintiff and from the agent.

The said agent has agreed to act as such on behalf of lessees without any compensation on the part of the plaintiff.

Supplemental Affidavit of Wilbur G. Silverman

It is respectfully submitted that this motion (39) should be decided upon the facts in this case and not under some academic facts which are not before the Court.

Submitted in a separate memorandum are Federal Court decisions referred to by deponent during argument this day.

WHEREFORE, deponent prays that the defendants' motion to quash service be denied in all respects and that the Clerk be directed to enter judgment in favor of the plaintiff in accordance with law.

(Sworn by Wilbur G. Silverman on March 7, 1962.)

Complaint

(1) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff complaining of the defendants by its attorney, Wilbur G. Silverman, Esq., alleges upon information and belief:

FIRST CAUSE OF ACTION

First: That at all times hereinafter mentioned, the plaintiff is a Delaware corporation, having its principal place of business at One Plainfield Avenue, Elmont, N. Y., within the geographical confines of this district.

Second: That the defendants, Steve Szukhent and Robert Szukhent are citizens of the State of Michigan, having its principal place of business at Flushing, Michigan.

Third: That this Court has jurisdiction by reason of diversity of citizenship.

Fourth: That the defendants have designated Florence Weinberg, who resides at 47-21 41st Street, Long Island City, as an agent for the purpose of accepting service of process within the State of New York.

Fifth: That heretofore; plaintiff leased to the defendant, certain equipment pursuant to a written lease designated OE 1775 and Schedule A thereto, copies of (2) which are hereto annexed and made a part hereof as if fully set forth at length herein.

Sixth: That said defendants defaulted in making the first payment due June 20th, 1961 and the months subsequent thereto.

Seventh: Although said defendants were duly notified in writing of their default as aforesaid, they failed to cure said default within the time limited by said lease and are still in default thereunder.

Eighth: By reason of said default, plaintiff has declared all of the said rentals under said lease and schedule due and payable, to wit, the sum of $20,620.00, with interest from June 20, 1961.

Ninth: That no part of the aforementioned sum of $20,620.00 has been paid, although due demand therefor has been made, in accordance with the terms of said lease.

Tenth: That by reason of the foregoing, there is now due to the plaintiff from the defendant, the sum of $20,620.00 with interest thereon from June 20, 1961.

SECOND CAUSE OF ACTION

Eleventh: Plaintiff repeats and reiterates each and every allegation contained in paragraphs marked "First" through "Tenth" inclusive of the complaint, as if fully set forth at length herein.

Twelfth: Pursuant to the terms of the aforementioned lease, in the event of default on the part of the lessee, the lessee became liable for all expenses incurred by lessor in connection with the enforcement of its (3) remedies, including legal expenses and attorneys fees equal to 15% of the total unpaid balance.

Thirteenth: That by reason of the aforesaid, defendant is liable for attorneys fees equal to $3,093.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $23,713, with interest on $20,620.00 thereon, from June 20, 1961, together with the costs and disbursements of this action.

WILBUR G. SILVERMAN
Attorney for Plaintiff
Office & P.O. Address
88-11 169th Street
Jamaica 32, N. Y.

[fol. 24]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21—October Term, 1962
Argued October 11, 1962
Docket No. 27486

NATIONAL EQUIPMENT RENTAL, LTD., Plaintiff-Appellant,

v.

STEVE SZUKHENT and ROBERT SZUKHENT,
Defendants-Appellees.

Before: Clark, Moore and Smith, Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., quashing service of summons and complaint on non-resident defendants in action on a farm equipment lease.

Affirmed.

Wilbur G. Silverman, Jamaica, New York, for plaintiff-appellant.

Harry R. Schwartz, Brooklyn, New York, for defendants-appellees.

[fol. 25]

OPINION—December 6, 1962

SMITH, Circuit Judge:

Defendants, residents of Michigan, obtained farm equipment in Michigan on a lease from plaintiff, a Delaware Corporation with its principal place of business in New

York. Claiming default, plaintiff sued for payments under the lease in the Eastern District of New York, the marshal delivering two copies of the summons and complaint to one Florence Weinberg as agent designated in the lease for the purpose of accepting process for defendants in the State of New York. The copies were promptly forwarded by Weinberg to defendants by mail with a covering letter under an agreement between Weinberg and plaintiff to perform this service without compensation. Nothing in the lease required notice to defendants. Plaintiff also notified defendants by mail promptly on the purported service of the process. The United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., held the service invalid and quashed the service. Plaintiff appeals. We agree with the District Court that no valid agency of Weinberg for defendants was created by the instrument in suit and affirm the order.

The lease contract here was on a printed form provided by plaintiff. There is no requirement in the purported appointment of the agent for any notice to defendants. A provision for notice would be essential to the validity of a state statute providing for substituted service on a statutory "agent". *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928). There is no such requirement when individuals freely contract for a method of substituted service. Lack of such a provision in a contract of adhesion, here involved, may, however, be considered in determining the meaning and effect of the provisions of the contract. There is no provision in the lease for any undertaking by the purported agent to act for, or give notice to her purported principal. [fol. 26] Normally, an agency exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act, Restatement Agency § 15, and the agent is subject to control by the principal, Restatement Agency § 1. Plaintiff's affidavits demonstrate that Weinberg was acting under an agreement with and supervision of the plaintiff, having undertaken no obligations to defendants, to whom she was unknown. Defendants never dealt with her and had no indication of any undertaking on her part to act as their agent until receipt of the process many months later.

The court properly held such a purported appointment unreal and ineffective to create a genuine agency of Weinberg for defendants.

Plaintiff might have provided, with defendants' agreement, that service or notice be waived or that notice be given by plaintiff. See *Bowles* v. *J. J. Schmitt & Co.*, 170 F. 2d 617, 622 (2 Cir. 1948), *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931). This would, however, have required defendants' consent, which might or might not have been forthcoming. The illusory purported agency provision, however, is properly held ineffective to subject defendants to suit in New York.

Affirmed.

MOORE, Circuit Judge (dissenting)

The question here presented goes so much beyond the facts of this particular case that I believe my contrary view should be stated. After all, it may be said, who (except this plaintiff, of course) cares whether a Michigan farmer pays for machinery he has leased in New York? However, the federal jurisdiction problem presented here is of the greatest commercial importance to merchants and consumers who engage in interstate business transactions. [fol. 27] Furthermore, the opinion of the majority would appear to be in conflict with *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957) and *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 882 (1958).

Plaintiff, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in an instrument denominated a lease. Defendants, residents of Michigan, obtained farm equipment from plaintiff pursuant to such a lease, the last operative clause of which read:

> " * * * and the Lessee hereby designates Florence Weinberg, 47-21 Forty-First Street, Long Island City, New York, as agent for the purpose of accepting service of any process within the State of New York."

Plaintiff, alleging default under the lease, commenced this action in the Eastern District of New York. The Marshal delivered two copies of the summons and complaint to defendants' designated agent, Florence Weinberg, who promptly mailed them to defendants with a covering letter, explaining that they had been served upon her as the defendants' agent in accordance with the provisions of the lease. On the same day, plaintiff itself notified defendants by certified mail of the service of process on Florence Weinberg. Twenty-two days after this service, counsel for defendants notified plaintiff's attorney that he was appearing specially to set aside the service of the summons and complaint. The District Court held the service invalid and quashed it.

The clause appointing the agent was no fine print clause buried in an oppressively long and complex instrument. [fol. 28] The entire contract is only 1¼ pages long and the agency provision is in the last paragraph appearing directly above defendants' signatures. The clause was included in the contract for the purpose of subjecting defendants to suit in the courts[1] in New York and for no other purpose. Without such a clause plaintiff might well have refused to make the contract. To carry a New York obtained judgment to the other forty-nine States for enforcement is quite a different matter than trying lawsuits and engaging counsel for this purpose in these other States.

The trial court found that it was plaintiff's established practice to assure that prompt notice was sent to defendants of any action it brought against them. That citizens of different states may agree in advance that any disputes arising out of a commercial transaction between them shall be subject to the jurisdiction of the courts of a designated state is well established. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948);

[1] Such an agency designation would not subject the defendants to the jurisdiction of the courts of the State of New York. *Rosenthal* v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. S. 154 (App. Div. 1921).

Gilbert v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); Restatement, Conflicts § 81; Restatement, Judgments § 18; *cf Adams* v. *Saenger*, 303 U. S. 59 (1938).

The only question presented by this appeal[2] therefore is [fol. 29] whether the service made on Florence Weinberg is service on "an agent authorized by appointment * * * to receive service of process" within the meaning of Rule 4(d)(1) of the Federal Rules of Civil Procedure.[3] The majority's strained search for the contract's "meaning" and "effect", and their invocation of *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928) to provide the unexpressed intendment of the parties do not obliterate the federal nature[4] of the question being here decided. Although my colleagues do not expressly evince a desire to remove Rule 4(d)(1) from the books entirely, they not only substantially rewrite the Rule but also write for the parties a contract into which they probably never would have entered.

The majority initially concede that the constitutionally dictated requirements of *Wuchter* v. *Pizzutti, supra*, do not apply to contracts entered into by individuals. Then, in the guise of construing the contract in question, they read those same requirements into Rule 4(d)(1). That this is the effect of their decision is made clear by their concern that "there is no provision in the lease for any undertaking

---

[2] Since there was jurisdiction of the present suit solely on the ground of diversity of citizenship and since the suit was brought in the district of the plaintiff's residence, there was, by virtue of § 1391 of the Judicial Code, no want of venue and the district court was not warranted in dismissing the suit if the service of summons was effective to make the defendant a party. For a similar situation see *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438 (1945).

[3] The agency appointment in question was framed to a large extent in the language of that Rule. The Rule, in pertinent part, reads as follows:

> (4)(d) * * * Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint *to an agent authorized by appointment* or by law *to receive service of process*. (Emphasis added.)

[4] See *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948).

by the purported agent to * * * give notice to her purported principal." In *Wuchter*, the Supreme Court held invalid the non-resident motorist statute in question because "the statute of New Jersey * * * does not make provision for communication to the proposed defendant." Rule 4(d)(1) is now construed to mean that any agency arrangement that does not impose upon the designated agent a contractually [fol. 30] unassailable duty to send notice is not sufficient to subject the appointing party to the personal jurisdiction of the courts of the designated state. The fact that notice was actually given is held to be of no consequence.

The Supreme Court, in *Wuchter*, declared that in those situations in which a State may subject a non-resident individual to the jurisdiction of its courts other than through personal service within the State, due process requires that the statutory scheme provide a means of service reasonably calculated to apprise the defendant of the proceedings against him. Compare *Wuchter, supra*, with *Hess* v. *Pawlowski*, 274 U. S. 352 (1927). See *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). In that case the Court was dealing with the limitations on the coercive powers of the States imposed by the due process clause of the Fourteenth Amendment, and not with arrangements for service of process voluntarily agreed to by individuals. As Cardozo, J., said in related context, "The distinction is between a true consent and an imputed or implied consent, between a fact and a fiction." *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 437 (1916). See L. Hand, D. J., in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S. D. N. Y. 1915). The demise of the implied consent theory serves only to accentuate that distinction, namely, between a voluntary and a forced subjection to the jurisdiction of the courts of a state.

Actual notice by an agent authorized by appointment to receive service of process should be dispositive. The reasoning of Justices Brandeis' and Holmes' dissent in *Wuchter* is, in the context of Rule 4(d)(1), compelling:

> "Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual

knowledge and the opportunity to defend. The cases [fol. 31] cited by the Court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seem hardly reconcilable with a long line of authorities." 276 U. S. at page 28.

To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend. *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Wuchter* v. *Pizzutti*, *supra*; *Grooms* v. *Greyhound Corp.*, 287 F. 2d 95 (6th Cir. 1961); *Tarbox* v. *Walters*, 192 F. Supp. 816 (E. D. Pa. 1961); *American Football League* v. *National Football League*, 27 F. R. D. 264 (D. Md. 1961). Once it is found that that purpose has been served, the inquiry should come to an end.

I do not reach the question whether actual receipt of notice by the defendant is always required because here notice was received. If the agent is the nominee of the defendant, plausible argument has been made that service of process is valid even though notice is not forwarded to the defendant. *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 822 (1958).

In considering this question, the Vermont court said:

> "The capacity of the Secretary of State to accept the appointment and the danger that he might not forward notice to the defendants were risks which they took in appointing him. Restatement Agency § 21." 120 Vt. at page 336.

[fol. 32] Also apropos here are the words of the Supreme Court in the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735 (1877):

"It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."

The rationale of the majority opinion would, however, extend even to the case posited. They require that the authorization to receive service of process intrinsically provide that the agent be bound to forward notice to the defendant. If, for example, defendants in the present action had selected Florence Weinberg themselves but no consideration ran to her or some other contractual infirmity existed, they would hold that service on her was invalid because she was under no obligation, no binding undertaking, to forward notice. And yet they actually go so far as to concede that a contract providing for no notice at all would have been permissible. Also implicit in the majority opinion is the thought that an appointed agent must be presumed to be faithless to his obligation and that some compensation must be paid by the principal for the services. If these are to be the legal consequences, then precautionary steps should be taken to require that the contract provide for a certificate from the agent in substance as follows: "I, Florence Weinberg, hereby agree for good and valuable consideration by me received from the Lessee, faithfully to perform my agency duties and to forward forthwith by registered mail any papers served on me."

At the heart of the majority opinion there seems to lie a mistrust of the agency provision in question because it might be construed to permit the entry of a default judg- [fol. 33] ment with no notice being provided the defendants.[5] Hard cases may make bad law but easy cases,

[5] If it should be deemed necessary in this case to engage in contract interpretation, I believe that the far more reasonable and realistic view of this agency provision, in view of the plaintiff's firmly established practice, would be one requiring that notice be given the defendants, if not by the agent, then by the principal. See the dissents of Justices Brandeis, Holmes and Stone in *Wuchter v. Pizzutti*, 276 U. S. 13, at pages 25 and 28. If proof of such notice

misconceived to be hard ones, make even worse law because in the latter there is not even the seeming justification attendant the former.

Defendants here received all they were entitled to. They agreed to submit to the jurisdiction of the courts in New York and that is all plaintiff required them to do. No default judgment is contemplated; they received adequate notice of the suit pending against them and were afforded ample opportunity to defend. In order to relieve them of this obligation which they voluntarily incurred, the majority throws in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty. If, as the majority seem to fear, this agency provision can be used as a vehicle of oppression and overreaching, I suggest that we wait until such a case is presented to us. The same Federal Rules that provide for service of process upon an agent authorized to receive such service also contain provision for the setting aside of default judgments, Rule 55(c), and for relieving a party from a final judgment, Rule 60(b). I cannot bring myself to believe that the federal courts would not, in such a case, use the above rules to good advantage.

I would require the parties to abide by their contract and would reverse the district court.

---

were not forthcoming, the service of process would be properly quashed.

The nub of my disagreement with the majority, of course, is that they read into Rule 4(d)(1) the requirement that the agent be under an unassailable obligation to send notice, regardless of whether notice is actually sent by the agent, by the plaintiff, or as here, by both.

[fol. 34]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

NATIONAL EQUIPMENT RENTAL, LTD., Plaintiff-Appellant,

v.

STEVE SZUKHENT and ROBERT SZUKHENT, Defendants-Appellees.

JUDGMENT—December 6, 1962

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro, Clerk.

[fol. 35] [File endorsement omitted]

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 873—October Term, 1962

NATIONAL EQUIPMENT RENTAL, LTD., Petitioner,

vs.

STEVE SZUKHENT, ET AL.

ORDER ALLOWING CERTIORARI—April 22, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.